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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 749 46

NATIONAL COAL ASSOCIATION, UNITED MINE WORKERS OF AMERICA, FUELS RESEARCH COUNCIL, INC.,
*Petitioners,*

*v.*

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., AND THE CITY OF NEW YORK

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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National Coal Association, United Mine Workers of America, and Fuels Research Council, Inc., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above cases on November 3, 1959.

### OPINIONS BELOW.

The opinion of the Court of Appeals (*infra*, pp. 27-46) is reported at 271 F. 2d 942. The orders of the Federal Power Commission denying the certificate

application (R. 174a-183a*) and denying rehearing (R. 184a-194a) are reported at 21 FPC 138 and 21 FPC 399.

## JURISDICTION.

The judgment of the Court of Appeals was entered on November 3, 1959 (*infra*, p. 47). By order issued January 28, 1960, the time for filing a petition for writ of certiorari in the above-entitled cause was extended to and including March 1, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Section 19 (b) of the Natural Gas Act, 15 U.S.C. 717r (b).

## QUESTIONS PRESENTED.

The questions presented for review are:

1. Whether the Federal Power Commission in the exercise of its certificate power under the Natural Gas Act can consider the end use of the gas in a proposed service as affecting "the present or future public convenience and necessity";

2. Whether in such a proceeding the Commission can consider the effect of non-jurisdictional sales upon interstate gas prices and availability of gas supplies to the consuming public;

3. Whether the Court of Appeals exceeded its power by directing the Commission to issue the certificate applied for, without permitting it to reconsider the application and the requirements of the public convenience and necessity in light of the court's decision?

## STATUTES INVOLVED.

The pertinent provisions of the Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U.S.C. 717, *et seq.*,

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*"R" references are to page numbers in printed Joint Appendix.

are set forth, *infra*, at pp. 48-52. Immediately involved is Section 7 (e), 56 Stat. 84 (1942), 15 U.S.C. 717f (e):

> Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

## STATEMENT.

Transcontinental Gas Pipe Line Corporation (Transco) filed an application with the Federal Power Commission for a certificate of public convenience and necessity under Section 7 (c) of the Natural Gas Act, to construct and operate pipeline facilities for the interstate transportation of 50,000 Mcf of natural gas per day exclusively for Consolidated Edison Company of New York, Inc. (Con Edison).[1] This so-called

[1] The Commission permitted these petitioners, National Coal Association, United Mine Workers of America, and Fuels Research Council, Inc., to intervene in opposition to the applica-

"X-20" service was for the transportation of gas purchased directly by Con Edison from Texas producers to be used as boiler fuel in Con Edison's Waterside steam electric generating station in New York City. This gas would displace large tonnages of coal now used at that plant (R. 105a).

Con Edison's gas was specifically restricted by contract with the producers for use as boiler fuel and could not be resold (R. 108a). This arrangement was admittedly motivated by the producers' desire to avoid regulation by the Commission (R. 108a). Under the X-20 proposal Transco was also committed to deliver to Con Edison upon request up to 50,000 Mcf of natural gas per day out of its own reserves for a period not to exceed 60 days in any year. This interruptible supply was unrestricted as to end use (R. 5a-6a).[2]

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tion." It also permitted Con Edison and the City of New York to intervene in support of the application. New York Public Service Commission, another intervenor, took no position in respect to the X-20 proposal.

[2] Transco's CD-3 rate under which Con Edison presently purchases its gas contains the following limiting provision:

> "(b) **Deliveries of gas to be used or resold for boiler fuel** may be curtailed by Seller on an equitable basis when such gas is, in Seller's opinion, required by Seller for use in its underground storage facilities; provided, however, that the consumption of natural gas for boiler fuel in amounts up to 500 Mcf per day by any consumer shall be exempt from such curtailment and no such curtailment shall be made which will cause Buyer to receive less than 65 percent of the maximum quantities of gas Buyer is entitled to purchase under this rate schedule, based upon the contract demand, during the current year." (FPC Gas Tariff, Orig. Vol. No. 1, Orig. Sheet No. 17-A and Seventh Rev. Sheet No. 17-B).

The X-20 proposal would permit Con Edison alone of Transco's resale customers to circumvent this limitation.

Transco's application for the X-20 service was only the first step in Con Edison's much broader program to convert two of its electric generating stations from coal to natural gas. Were its program to be fully accomplished, Con Edison eventually would have a daily volume of 120,000 Mcf transported to New York City by Transco exclusively for boiler fuel use in its Waterside and East River Stations (R. 5a, 7a, 11a, 17a, 24a).

At the certificate hearing Con Edison attempted to show that the X-20 service was in the public interest because it would contribute to the reduction of air pollution in the vicinity of its Waterside station by eliminating the use of coal altogether in two of the boilers which produced only 2 percent of the overall system electrical load (R. 16a, 81a, 88a-89a, 97a). The stack emissions at Waterside were within the permissible limits of stack emissions for plants of this size under the rules and regulations of the Department of Air Pollution Control of the City of New York (R. 93a-96a, 108a-109a), and there was no showing that the air pollution problem could not feasibly be controlled by other means than conversion to gas under the X-20 proposal.

In his initial decision on July 9, 1958, the Presiding Examiner concluded that Transco and Con Edison had "not sustained their burden of establishing that this service is required by the public convenience and necessity" (R. 172a).[3] However, the Presiding Examiner

[3] The Presiding Examiner's analysis of the speculative quality of petitioners' supporting evidence is well illustrated by these passages:

"*If* the smoke from Waterside No. 2 were provably injurious to life or health or *if* the economic losses, (such as lowering of real estate values, high cleaning costs for buildings) were

believed that the Commission was foreclosed by the Act from considering "the public interest aspect of the end use [of the gas]" (R. 171a), and he therefore granted Transco's application for the X-20 service.

On January 30, 1959, the Commission reversed the Presiding Examiner and, balancing the policy considerations which bore upon the present and future public convenience and necessity, it denied the transportation certificate largely on the basis of end use conservation, prospective impact on producer prices, and preservation of equality of access by smaller consumers to the limited supply of natural gas (R. 174a-183a). After the Commission's denial of their applications for a rehearing (R. 184a-194a), Transco, Con Edison and the City of New York separately filed petitions for review under Section 19 (b) of the Act in the Court of Appeals for the Third Circuit. Your petitioners were granted leave to intervene in support of the Commission's order in each review proceeding. The petitions subsequently were consolidated for hearing.

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outstanding; *if* the city's health officials were legally powerless to act on a matter they had determined to be dangerous, *if* it was not possible for Consolidated Edison to shift load to other stations and close down these boilers, then we could say without doubt that this proposal would be in the public interest and required by the public convenience and necessity. As a matter of fact, if all these *ifs* were established by the record, the use of this gas for boiler fuel would be markedly more necessary and valuable than for home space heating, cooking or water heating!

"The record in this case does indicate that Consolidated Edison should do something about these annoying smokers—and whether that something in the absence of utilizing natural gas is to renovate the equipment, raise the stacks, or shift the load to some other plant is a matter for others to determine. The opportunity for discussion and speculation on this point is virtually limitless." (Emphasis supplied by the Presiding Examiner) (R. 172a-173a).

The Court of Appeals set aside the Commission's order and directed the Commission to issue the certificate, holding that the Commission went beyond its statutory authority: in disapproving of the end use to be made of the gas for boiler fuel; in recognizing that the impact of demand by large utilities for this kind of firm service would increase prices and make pipeline purchases in the field more difficult; and in considering that such proposals would utilize facilities which would otherwise be available for more beneficial public needs. To give weight to these factors at all as elements of the public convenience and necessity, said the court, was "an assertion of authority for general conservation" and would put a consideration into the Act which Congress did not intend (*infra*, pp. 44, 45).[4]

## REASONS FOR GRANTING THE WRIT.

This Court should review the decision of the Court of Appeals in this case because it involves questions of transcendent national importance in the administration of the Natural Gas Act.

In reversing the Federal Power Commission's order, the court below has restricted the Commission's certificate powers and denied its authority to consider as elements of the public convenience and necessity the relative benefit to the public of the proposed use of the gas as well as the impact of non-jurisdictional sales upon interstate gas prices and the availability of gas supplies to less favored users.

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[4] Although the court said it should not interfere with the Commission's weighing of the factors on the use of gas as boiler fuel "if a rational conclusion has been reached", it implied that the Commission's "assumption" that such a use was "inferior" was not "a rational conclusion" because the gas-generated electricity and steam would also serve domestic users for heating and lighting (*infra*, pp. 45, 46).

This decision overturns a long established administrative policy of the Power Commission of giving due weight in certificate proceedings to the public interest in conserving natural gas, by considering the proposed use of the gas and restricting its use as boiler fuel in the absence of a positive showing of public convenience and necessity. This policy was established following the enactment of the 1942 amendment to Section 7 of the Natural Gas Act which broadened the Commission's certificate power and authorized it to consider end use conservation in proceedings of this kind. See *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 612, 616-617 (1944); *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464, 468-469 (1950). By denying the Commission's authority to consider the end use of the gas, the court below has seriously impaired the standing of competing fuel interests, such as the coal industry, the coal-carrying railroads, and the employees dependent upon them for their livelihood, to demonstrate the relative advantage and disadvantage to the total public interest of a proposed new service.

Since the court below held that the Commission exceeded its statutory jurisdiction when it considered the end use of the gas as a factor which bears upon the public convenience and necessity, its decision conflicts fundamentally with the principle followed by the Court of Appeals for the District of Columbia, which has held that this is a proper element for the Commission's consideration in certificate proceedings. *Charleston & W. C. Ry.* v. *FPC*, 234 F. 2d 62, 64. (D.C. Cir. 1956); *National Coal Ass'n* v. *FPC*, 191 F. 2d 462 (D.C. Cir. 1954).

The order of the court below remanding the case to the Commission with directions to issue the certificate conflicts with the decisions of this Court which hold

that the reviewing court is limited to discovering legal error in the proceedings and remanding the case to the Commission for further consideration in light of its opinion. *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20-21 (1952). By decreeing the issuance of the certificate, the court assumed the administrative authority of the Commission, and thereby exceeded its powers of judicial review.

**I. The Court of Appeals Has Decided An Important Question of Federal Law Which Should Be Resolved by This Court, and It Has Overturned a Long Established Administrative Policy of the Federal Power Commission.**

This Court has never squarely decided the important question of federal law which is raised in this case: whether the Federal Power Commission in exercising its certificate authority may give consideration to the conservation aspects of the intended use of the gas as bearing upon the present or future public convenience and necessity and may deny a certificate if in its judgment the proposed use does not meet that standard.

In setting aside the Commission's order here the Court of Appeals has held, in effect that the Commission must wilfully blind itself to the fact that Con Edison's gas will be used exclusively as boiler fuel and must shut out from its inquiry any consideration of whether this proposed use is for a "superior" or "inferior" purpose, as measured by the present or future public convenience and necessity.

In reaching this result the court below disregarded statements of this Court in *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 616-617 (1944), that considerations of conservation are material to the exercise of the Commission's certificate power under Section 7 of the Natural Gas Act. While this Court there held that

such considerations could not influence the Commission in the exercise of its rate-making powers,[5] it said: "We may assume that, apart from the express exemptions contained in Section 7, considerations of conservation are material to the issuance of certificates of public convenience and necessity." (*Id.* at p. 612) Contrasting the Commission's rate-making power with its certificate power, the majority of this Court went on to say that the latter power was further reaching by reason of the 1942 amendment to the Act (at pp. 616-617): "The Act of February 7, 1942, by broadening Section 7 gave the Commission some additional authority to deal with the conservation aspects of the problem." The Court also observed that "the Commission has been alert to the problems of conservation in its administration of the Act." *Id.* at p. 617, fn. 30. In this connection it quoted from the Commission's annual report which stated that the general use of natural gas under boilers for the production of steam is "under most circumstances of very questionable social economy." *Id.* at p. 617, fn. 30. The Court of Appeals in the instant case paid no heed to these declarations of the scope of the Commission's authority to consider the conservation aspects of the end use of natural gas in certificate proceedings.

It completely ignored this Court's decision in *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464, 468-469 (1950), where the Court again referred to the fact that the 1942 Amendment gave broader certificate powers to the Commission, following a report to Congress which

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[5] Justices Frankfurter and Jackson, dissenting, would have required the Commission to utilize its rate-making power to foster superior uses of natural gas because of the importance of conserving this limited natural resource. 320 U.S. at pp. 626, 627, 639, 657-659.

emphasized conservation as a proper element for the Commission's consideration. There the Court again said (at pp. 468-469):

> "Moreover, the initial interest of Congress in regulation of transportation facilities was re-emphasized in 1942 by passage of an amendment to §7 (c) of the Act broadening the Commission's powers over the construction or extension of pipe lines. 56 Stat. 83. This amendment followed a report of the Commission to Congress pointing out that without amendment the Act vested the Commission with inadequate power to make 'any serious effort to control the unplanned construction of natural gas pipe lines with a view to conserving one of the country's valuable but exhaustible energy resources.'"[6]

Disagreeing with this Court's reading of the 1942 amendment as broadening the Commission's certificate power to take into account considerations of end use conservation, the court below laid greatest stress upon what it called "the Commission's own concession of lack of such power," which it purported to find in the Commission's 1944 Report to Congress (*infra*, p. 36). In relying on this fancied "concession", the court thrust aside the Commission's long established practice of giving weight to end use considerations in certificate cases, ignored the context of the so-called "concession," and gave no weight whatever to later statements of the Commission to Congress which clearly reflect the Commission's conscious and continuing exercise of its certificate power to consider end use factors.

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[6] Congress later amended the Act to exempt wholly intrastate transportation and sale of gas, 68 Stat. 36 (1954); 15 U.S.C. §717 (c), but this amendment in no way impinged upon the conservation aspects of the Commission's certificate jurisdiction.

The portion of the Commission's 1944 Report in which the court below found the "concession" of a lack of power to consider the end use of the gas in certificate proceedings is not a concession at all. When read in context with its explanatory footnote (which was omitted by the court), it is quite clear that the limitation which the Commission recognized was upon its power to regulate rates for the direct sales of natural gas to industry, and because of the absence of *this* power, it of course did not have "comprehensive powers" to deal with the end uses of natural gas.[7]

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[7] The footnote which the court omitted reads as follows:

"14 In its Opinion No. 93-A, which accompanied its order of September 24, 1943, issuing a certificate of public convenience and necessity to Tennessee Gas & Transmission Co. for the construction and operation of a natural-gas pipe line from Texas to West Virginia, the commission stated:

'Interveners representing coal operators, labor unions, and railroads, having a vital stake in the coal industry in the Appalachian area, oppose the granting of a certificate for the construction of applicant's proposed natural-gas pipe line principally on the ground that the present and future fuel needs of that area can be adequately met by coal. It is contended that the use of natural gas for industrial and space-heating purposes constitutes a dissipation of the natural-gas resources, and threatens the coal industry with ruinous competition. Considerable evidence was adduced by these interveners for the purpose of supporting such contentions.

'We recognize the force of these arguments and are not unmindful of the economic and social aspects of the problem posed by these interveners. We are not authorized, however, to *regulate rates* for natural gas sold *directly* to industrial consumers, which class of gas sales furnishes the keenest competition to the coal industry. Nor does our power to *suspend rates* extend to *indirect* sales of natural gas for industrial purposes. It appears, *therefore*, that the Natural Gas Act does not vest this Commission with *complete* and *comprehensive* authority which would permit us to act as arbiter over the end uses of natural gas.'" (Emphasis supplied) *The First Five Years Under the Natural Gas Act*, p. 15, January, 1944.

To say, as the Commission did in January, 1944, that its power to deal with end uses of natural gas is not "complete and comprehensive" is not to say, as the court below would have it, that the Commission conceded that it has no power at all to give consideration to end use in certificate proceedings. Later declarations of the Commission to Congress make this clear.

In a report to the Senate Committee on Interstate Commerce on S.J. Resolution 92, dated January 17, 1944, and submitted in April, 1944, the Commission stated that the amendment to Section 7 of the Natural Gas Act gave it broadened powers to "consider the social and economic effects of the use of natural gas on competing fuels in certificate cases."[8]

In 1949, the Commission again told Congress that in certificate proceedings it does give consideration to the proposed uses of the gas and has adequate power to do so "under the present Act."[9] These later declar-

[8] The Commission said:

"*The amendment to section . of the Natural Gas Act [in 1942] removed the statutory impediment to consideration by the Commission of the social and economic effects of the use of natural gas and competing fuels in certificate cases, which existed prior to the amendment;* but the consideration of such interests in particular cases only makes more necessary a general investigation inquiring into the subject matter on a national basis such as that proposed by the joint resolution." (Emphasis supplied)

Printed with S. Rep. No. 1234, 78th Cong., 2d Sess. 6, (1944).

[9] In its report to the House Subcommittee on Petroleum and Federal Power with reference to H.R. 982, the Commission stated:

"The 10-point policy would— • • •

'(2) Conserve the reserves of natural gas for utilization which affords the highest social benefits to the public, consistent with reasonable rates and adequate service;'

"This, of course, proposes a limitation on the purposes for which gas may be utilized. In order to be fully effective it

ations by the Commission are certainly entitled to equal weight with the so-called 1944 "concession." But of far greater significance than its own statements to Congress on the extent of its authority is the conservation policy on boiler fuel use established by the Commission's decisions on certificate applications.

Instead of giving due weight to the Commission's interpretation of its authority as reflected by its repeated consideration of end use aspects of conservation in certificate proceedings, *Boehm* v. *Commissioner*, 326 U.S. 287, 292 (1945); *Panhandle Eastern Pipe Line Co.* v. *FPC*, 232 F. 2d 467, 471 (3rd Cir. 1956), *cert. denied*, 352 U.S. 891 (1956), the court below overturned the long established policy of the Commission of considering the use of the gas as bearing upon the public convenience and necessity. In these certificate applications the Commission has recognized that natural gas is a limited resource which should be preserved for demonstrably superior uses for which other fuels may not be suitable.

This is not a simple conflict between industrial and domestic uses, as the court below seemed to believe.[10]

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would be necessary to extend the Commission's jurisdiction to intrastate sales because the great bulk of gas sold for so-called inferior industrial uses is either sold in the field or by distributing companies over which the Commission does not have jurisdiction. The Commission, however, is aware of the problem and *in certificate cases it does give consideration to the proposed uses of the gas in question. The Commission believes that, under the present act, it may give proper consideration to this matter in certificate proceedings.*" (Emphasis supplied) Hearings Before Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, on H.R. 79, H.R. 1758 and H.R. 982, 81st Cong., 1st Sess., April 25, 1949, p. 163.

[10] The Court of Appeals measured the Commission's finding of inferiority by juxtaposing domestic against industrial uses. Since some of the power generated by the gas-heated boilers was used

Gas for industrial uses requiring delicate heat control is a superior use. But as boiler fuel, for which more abundant coal is eminently satisfactory, gas should be used only upon "a positive showing that it is required by public convenience and necessity" under the long established policy of the Federal Power Commission. *Mississippi River Fuel Corp.*, 12 FPC 109, 112.

This policy has been followed not by uniformly denying certificates which involve the burning of gas under boilers, but by keeping such use under careful limitations: certificating it in restricted quantities on an interruptible basis in order to make total pipeline operation more economical by boosting the load factor;[11] certificating firm boiler fuel use only in extra-

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for making steam for heating and electricity for lighting of apartment houses, the court was satisfied that in its own judgment the use of gas as boiler fuel was a superior use in this case, although it insisted that "the weighing of factors of this kind . . . is a matter in which a reviewing tribunal will not interfere . . ." (*infra*, p. 45).

[11] The Commission has certificated interruptible boiler fuel service in the following typical cases: *Transcontinental Gas Pipe Line Corp.*, 11 FPC 605, 615, up to 30,000 Mcf per day to Duke Power Company in South Carolina, where coal prices were somewhat in excess of gas, and Transco showed that a bottleneck prevented transportation of all the gas northward during "valley" periods, see also 14 FPC 436 (1955); *Texas Gas Transmission Corp.*, 12 FPC 658 (Examiner's decision which became final), up to 30,000 Mcf per day to Mississippi Power & Light Co., where there was evidence of considerable fuel savings and the pipeline showed a bottleneck resulting in excess capacity; *Southern Natural Gas Co.*, 14 FPC 243, 250 (1955) (two commissioners dissenting) affirmed *sub. nom. Charleston & W. C. Ry. Co.* v. *FPC*, 234 F. 2d 62 (D. C. Cir. 1956), 10,000 MMcf per year to South Carolina Generating Co.; *Northern Natural Gas Co.*, 15 FPC 1634, (one commissioner dissenting, one not participating in reversal of 15 FPC 682, two commissioners dissenting), affirmed *sub. nom. National Coal Association* v. *FPC*, 247 F. 2d 86 (D. C. Cir. 1957), up to 14,400 MMcf a year to Northern States Power Company in Minnesota.

ordinary circumstances;[12] and denying a certificate, as it did here, in the absence of a positive showing that it is required by the public convenience and necessity.[13]

This established administrative policy of the Federal Power Commission has now been overturned. The Court of Appeals in this case would foreclose the Commission from giving any consideration to the relative superiority or inferiority of the use for which the gas is intended; and, regardless of the impact upon this limited natural resource, would bind the Commission to certificate boiler fuel applications no matter what the public convenience and necessity suggested as a more suitable substitute.[14]

[12] In *Houston Texas Gas & Oil Corp.*, 16 FPC 118, (two commissioners dissenting) the Commission certificated firm and interruptible transportation arrangements for two Florida power companies because of the "atypical" character of the Florida markets, as the only way to render construction of the first pipeline to Florida economically feasible, a case which was *sui generis*, as the Commission said. In *East Tennessee Natural Gas Co.*, 8 FPC 836, affirmed *sub. nom. National Coal Association* v. *FPC*, 191 F. 2d 462 (D. C. Cir. 1951), the Commission authorized a firm service of 60,000 Mcf per day to the Atomic Energy Commission at Oak Ridge, Tennessee, where the A.E.C. intervened because the project was "necessary to assure the common defense and security of this country." 8 FPC at pp. 841-842.

[13] *Northern Natural Gas Co.*, 4 FPC 1099, permitted for pilot burners, ignition fuel, and emergency standby only; *Panhandle Eastern Pipe Line Co.*, F.P.C. Opinion 274 (July 28, 1954), where the claim was made of coal fly ash air pollution in Monroe, Michigan; *Texas Gas Transmission Corp.*, 10 FPC 391 (one commissioner dissenting); *Piedmont Natural Gas Corp.*, 9 FPC 70, 83-90, 629 (one commissioner concurring in the result).

[14] *Cf.* Justice Frankfurter, dissenting in *FPC* v. *Hope Natural Gas Co.*, 320 U.S. at pp. 626-627:

> "Or the Commission's rate orders must be founded on due consideration of all the elements of the public interest which the production and distribution of natural gas involve *just*

The effect of this decision of the court below is to carve out of the public convenience and necessity the important element of end use consideration. In so doing, the court has cut down the certificating power of the Commission, the only regulatory agency which, over the years, has made the value judgment as to whether the continued use as boiler fuel of an abundant fuel like coal is in the public interest in a given set of circumstances, reserving the scarcer resource of natural gas for superior uses.

With devastating impact the decision strikes at the coal industry and the thousands of employees represented by the United Mine Workers of America who are dependent upon this industry for their livelihood. These petitioners have regularly appeared in proceedings before the Federal Power Commission as "parties aggrieved" under the Act.[15] See *National Coal Association* v. *FPC*, 191 F. 2d 462 (D.C. Cir. 1951); *Charleston & W. C. Ry.* v. *FPC*, 234 F. 2d 62 (D.C. Cir. 1956). Because the introduction of natural gas into a market where coal has been utilized invariably results in dis-

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*because it is natural gas.* These elements are reflected in the Natural Gas Act, if that Act be applied as an entirety. See, for instance, §§ 4 (a) (b) (c) (d), 6, and 11, 15 U.S.C. § 717c (a) (b) (c) (d), 717e, and 717j. Of course the statute is not concerned with abstract theories of rate-making. But *its very foundation is the 'public interest,' and the public interest is a texture of multiple strands. It includes more than contemporary investors and contemporary consumers. The needs to be served are not restricted to immediacy, and social as well as economic costs must be counted.*" (Emphasis supplied)

[15] Representing coal producers, coal carriers, and union employees in the coal industry, petitioners since 1942 have appeared in over 200 separate dockets of the Federal Power Commission on applications for certificates of public convenience and necessity.

placement of coal,[16] the thrust of petitioners' efforts has always been to bring into sharp focus the relative values of coal and natural gas for the particular purpose that is intended to be served by the new service. And it is in the arena of end use consideration that the competition between these two fuel interests is finally resolved. See *Charleston & W. C. Ry.* v. *FPC*, 234 F. 2d 62, 64 (D.C. Cir. 1956).[17]

If, as the court below has held, the Commission is now to be foreclosed from giving any weight to considerations of end use in certification proceedings, the Commission cannot fulfill its duty of measuring the proposed service against the standard of the public convenience and necessity.

To determine on "which side of the controversy the public interest lies" the Commission must analyze "the total situation." Cf. *United States* v. *Detroit &*

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[16] In the post-war period, 1946-1958, the tremendous expansion of natural gas service has had a marked effect upon coal's traditional markets. Excluding non-competitive uses of natural gas and oil, coal in 1958 supplied 33.4 percent and natural gas 32.2 percent of the total fuel energy requirements of the United States as against 55.7 percent and 11.6 percent, respectively, in 1946. (Derived from United States Bureau of Mines, Minerals Yearbook, 1947 and 1958, Vol. II; Current Coal Trends, January, 1960, Vol. 7, No. 1, published by National Coal Association).

[17] That end use considerations are a vital element in resolving this conflict is apparent from the court's opinion in that case. After commenting upon the conflict between the coal and the gas interests in the proceeding before the Commission, the court quoted from the opinion of the dissenting commissioners:

> "'In these circumstances, the primary issue becomes a question of conservation of natural gas and we have a clear-cut case of whether to authorize the burning of quantities of this natural resource under boilers, where the evidence is clear that other fuels are readily and economically available, or to deny such authorization and preserve such quantities for superior uses.'" *Id.* at p. 64.

*Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945). But it cannot reach out to embrace "the total situation," in order to determine whether the public interest requires that vast tonnages of coal be displaced by natural gas to fire public utility boilers,[18] without looking at the use to be made of the gas and weighing the relative advantage and disadvantage in the totality of the public interest. The curtailment of the Commission's certificate power effected here by the court below requires review by this Court, for the certificate power, together with the rate-making power, is "the heart of the [Natural Gas] Act." *Atlantic Refining Co.* v. *Public Service Commission*, 360 U.S. 378, 388 (1959).

Of equal importance to the administration of the Act—though of lesser importance to the interests of the coal industry and the employees of this industry—is the question whether the Commission in exercising its certificate authority may consider the effect upon the public interest of direct sales by producers to large consumers, which threaten to inflate interstate gas prices and to restrict access by smaller consumers to gas sources. The decision of the court below, which prohibits the Commission from taking account of these considerations, will encourage the uninhibited development of these unregulated sales.

Although the Commission may have no authority to regulate direct sales, it is certainly empowered to weigh the impact of non-jurisdictional sales upon the subjects of its own regulation, here, resale gas rates

[18] "Congress was concerned with, and wished the Commission to consider, 'the effect of construction and extension (of natural gas pipelines) upon the interests of producers of competing fuels and competitive transportation interests.'" Citing H.R. Rep. No. 1290, 77th Cong., 1st Sess., p. 3, Oct. 21, 1941. *National Coal Association* v. *FPC*, 191 F. 2d 462, 465 (1951).

and interstate transportation facilities. See *Panhandle Eastern Pipe Line Co.* v. *FPC*, 232 F. 2d 467, 471 (3rd Cir., 1956); *cert. denied* 352 U.S. 891 (1956); *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 226 F. 2d 60 (6th Cir. 1955), *cert. denied* 350 U.S. 987 (1955). The need for such consideration is especially imperative where, as here, the restrictions in the producers' contracts with Con Edison, prohibiting resale and requiring that the gas be used as boiler fuel, were admittedly motivated by the desire to escape regulation (R. 108a). The price impact is obvious: as the new market, available only to the biggest utilities, grows up outside the reach of federal regulation, the cost to the regulated purchaser—and ultimately the consumer—is driven upward. The more insidious consequence to the public interest is the creation of a special preserve for large individual users, where discriminatory arrangments can be made which work to the disadvantage of smaller, less favored customers, to whom these non-jurisdictional channels are denied simply because they cannot afford to use them. *Cf.* Con Edison's position under Transco's CD-3 rate, footnote 2, *supra*.

**II. The Decision of the Court Below Conflicts in Principle With Two Decisions of Another Court of Appeals.**

The gravamen of the decision in this case is that the Federal Power Commission exceeded its statutory jurisdiction in certification proceedings when it gave any consideration at all to the end use of the gas by Con Edison and found that use inferior as measured by the standard of the public convenience and necessity. In reaching this result the court below insisted that it found no conflict, let alone inconsistency, between its decision and two decisions of the Court of

Appeals for the District of Columbia.[19] For it says that court held only that conservation considerations are "not controlling" while its own inquiry thrusts deeper, to whether they may be given any weight at all.[20]

In both of those cases the Court of Appeals for the District of Columbia followed a different principle. In each of them that court held that it was within the "legal competence" of the Commission to consider the end use of the gas, as well as other pertinent aspects of the public convenience and necessity, in a certificate proceeding. In *Charleston & W. C. Ry. v. FPC*, 234 F. 2d 62, 64 (D.C. Cir. 1956), the court affirmed an order of the Commission certificating the gas company to construct and operate a line for the delivery of natural gas to an electric company for the use of gas as boiler fuel. The court held that the Commission properly considered the use of the gas, as well as the adverse effects of such use upon the railroad and coal mining industries, in passing upon the issue of public convenience and necessity. That court said (at p. 64):

> "In the circumstances that we have outlined we find no legal basis for overturning the decision of the Commission. The Commission weighed the

[19] In *Department of Conservation* v. *FPC*, 148 F. 2d 746 (5th Cir. 1945) *cert. denied*, 326 U.S. 717 (1945), the Court of Appeals for the Fifth Circuit assumed without deciding that end use considerations were factors to be weighed in certification proceedings.

[20] "To say that considerations of conservation are not controlling does not aid in deciding whether or not such matters **may be considered at all**" (*infra*, p. 41). **The court below also** suggests that the Court of Appeals for the District of Columbia did not look at the legislative history of the Act because "there **was no need to make such a search**" (*infra*, p. 41).

> factors which competed in their minds on the issue of public convenience and necessity, with the evidence bearing thereon. Important among these factors is the public interest in railroad transportation, and in the status of coal mining in its employment and other economic aspects. But the Commission considered these matters. The conclusion reached in favor of the application is not unreasonable, and no significant procedural error appears . . . Had the decision initially been for us we might have reached a different conclusion, on the ground of the dissent [*i.e.* that conservation considerations required denial] or on other grounds. But the judgment of the Commission was within its legal competence."

In *National Coal Ass'n* v. *FPC*, 191 F. 2d 462 (D.C. Cir. 1951), the same Court of Appeals held that in a certificate proceeding the end use of the gas was among the elements which the Commission was authorized to consider, together with the effect of issuance of the certificate upon competing fuels and transportation and related labor interests, in determining whether the proposed service was required by public convenience and necessity.

The analysis by the court below of the policy considerations which influenced the Commission's order plainly shows that it believed and so found that the Commission's "examination and disapproval of the end use to be made of this gas" was outside the Commission's jurisdiction (*infra*, p. 32. The court's treatment of the evidence on air pollution, on which Transco and Con Edison relied to persuade the Commission that the X-20 proposal would serve the public convenience and necessity, further demonstrates that

it was in "the weighing of factors of this kind" that the Commission exceeded its power.[21]

Thus, while the Court of Appeals for the District of Columbia has clearly sanctioned the consideration of the end use of the gas as bearing upon the public convenience and necessity in a certificate proceeding, the court below has held that this consideration is beyond the Commission's statutory authority.

In an effort to rationalize its departure from the principle applied in the *Charleston & W. C. Railway* and *National Coal Association* cases, the court below "mentioned" that in those cases "the pipe line company involved was both selling and transporting gas. That is not true here." (*infra*, p. 41). This is a distinction without a difference. For this Court has made it plain that the "transportation" and "sale" of gas are "separate subjects of regulation" and have "independent and equally important places in the Act." *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464, 468 (1950); *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n. of Indiana*, 332 U.S. 507, 516 (1947). In fact, the court below in one of its own earlier decisions rejected the argument that, because the Commission had no jurisdiction over direct sales, it could not fully exercise its certificate authority over the transportation of gas and evaluate the effect of that "separate subject of regulation" upon the public convenience and necessity. *Panhandle Eastern Pipe Line Co.* v. *FPC*, 232 F. 2d 467, 471 (3rd Cir. 1956), *cert. denied*, 352 U.S. 891 (1956). That Transco was only transporting the gas for Con Edison and was not reselling it as

[21] The court said: "Of course the weighing of factors of this kind, *if within the jurisdiction of a body*, is a matter in which a reviewing tribunal will not interfere if a rational conclusion has been reached" (Emphasis supplied) (*infra*, p. 45).

well,[22] could not justify the court here in announcing a new principle of its own creation, that in certificate cases the Commission lacks the power to consider the end use of the gas in determining whether the proposed service meets the requirements of the public convenience and necessity.

### III. The Court's Order to the Commission to Issue the Certificate Conflicts With This Court's Decisions Which Hold That a Reviewing Court Has No Power to Exercise Administrative Authority.

In direct conflict with a long line of decisions of this Court, the Court of Appeals remanded the case to the Commission "with directions to issue the certificate applied for" (*infra*, p. 47), instead of permitting it to reconsider the application in light of the court's decision. It is not the function of the reviewing court under the Natural Gas Act thus to exercise the administrative authority of the Power Commission. Judicial review under the Act is limited to discovering legal error in the Commission's proceedings, defining that error, and remanding the case to the Commission for reconsideration under the newly defined legal principles. *FPC* v. *Idaho Power Co.*, 344 U.S. 17, 20-21 (1952); *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145 (1940); *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4, 10 (1942); *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 618-619 (1944).

Even if the court had been right in holding that the Commission exceeded its statutory authority by giving weight to some of the policy considerations which

[22] Of course, an integral element of the X-20 proposal was that Transco committed itself to sell out of its own reserves 50,000 Mcf of gas per day for a period up to 60 days in any year to Con Edison (R. 5a-6a).

influenced the denial of the application, it could not assume the Commission's decisional authority and decree the grant of the application, thereby foreclosing the Commission from a new look at the requirements of the public convenience and necessity under the changed circumstances of the case.

## CONCLUSION.

For the foregoing reasons the petition for certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted.

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